* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 6649/2005 and CRL.M.C. 6650/2005

Reserved on : March 5, 2007
Decided on : April 18, 2007

1. CRL.M.C. 6649/2005

D.K. RASTOGI ..... Petitioner
Through Mr. Naveen Malhotra, Advocate

versus

UNION OF INDIA ..... Respondent
Through Mr. Subhash Bansal, Advocate

2. CRL.M.C. 6650/2005

D.K. RASTOGI ..... Petitioner
Through Mr. Naveen Malhotra, Advocate

versus

UNION OF INDIA ..... Respondent
Through Mr. Subhash Bansal, Advocate

CORAM:
Mr.Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat

1. The petitioner in these proceedings under Section 482 Criminal Procedure Code (Cr.P.C.) claims quashing of a criminal complaint filed by

the respondent, Chief Enforcement Officer, alleging commission of offences under Sections 56 of Foreign Exchange Regulation Act, 1973 (hereafter "FERA") read with Sub-section 3 & 4 of Section 49 of the Foreign Exchange Management Act, 1999.

2. The facts necessary to decide the petitions are that M/s. Kudos Exports Pvt. Ltd. (KEPL) had imported worthless material claiming to be computer software from M/s. Ganton Limited, London, of Abhishek Verma arrayed as accused No.5. The consignment was imported through 13 invoices, of which ten were dated 12.4.1996 and three, dated 25.7.1995; the amounts towards the ten consignments were remitted through Bank of Rajasthan, South Extension., New Delhi. The rest were remitted through Union Bank of India, Yusuf Sarai, New Delhi. A total sum of US$ 17,74,000/- were remitted to the account maintained by M/s. Ganton Limited, London in Swiss Banking Corporation Zurich, from the accounts of KEPL.

3. The documents were forwarded by banks alongwith the copies of Bill of Entry of Warehousing, whereas the Bill of Entries for home consumption were not filed. Samples were drawn from the office of the Customs STPI, Noida from the stock of Autocad and representatives of M/s. Hindustan Office Product Limited, (one of the authorized distributors of USA based company M/s. Auto Desk) as an experts were consulted. The goods were inspected; it was alleged that Accused No.1 i.e. M/s. Kudos Exports Pvt. Ltd. had imported pirated software for an exorbitant price.

4. In the course of investigation and proceedings, statements of Sh. Ravi Bhatnagar, Director of M/s. Kudos Exports Pvt. Ltd. (also arrayed as third accused) were recorded under Sections 108 of the Customs Act as well as under Section 40 of the FERA. He alleged that all actions performed by him were under directions of the firth accused Abhishek Verma, Chairman of the second accused, Esam India Limited. Abhishek Verma, admitted to the facts, as well as about his being a Director of M/s. Esam Trading Company, responsible for its decisions and further being director of KEPL.

5. The petitioner was arrayed as the eigth accused; his statement was recorded under Section 40 of the FERA. He was a Chartered Accountant of M/s. Esam Trading Company, (the holding company of KEPL to the extent of 99%). It was also alleged that the transactions that were the subject matter of scrutiny leading to adjudication as well as the filing of the complaint were under the exclusive directions of Abhishek Verma.

6. On 17.1.2002, a show cause notice was issued to the petitioner and the other accused, impleaded in the complaint, alleging that they had violated various provisions of law. The show cause notice was resisted *inter alia* by the petitioner who disclaimed any liability and furnished his explanation. By the order in original issued on 31.3.2005, the Special Director (Enforcement), Central Government imposed penalties on M/s. Kudos Exports Pvt. Ltd., M/s. Esam Trading Company Ltd, M/s. Ravi Bhatnagar, Mr. Manish Bhatnagar, Mr. Abhishek Verma and Mr. M.A. Khan. The total penalty amounts

directed to be recovered from those accused, including the concerns/companies and the individuals were Rs.7,00,00,000/- (Rupees seven crores). The Special Director after discussing the evidence, materials on record and the explanation of the petitioner dropped the proceedings against him.

7. The findings of the Special Director as far as they were relevant for consideration in the present case, are extracted below:

> *" 58. From the foregoing facts, it was evident that the noticee company namely M/s. Kudos Exports (P) Ltd. had not imported goods of corresponding value both in terms of price of corresponding value both in terms of price and quality and the import invoices were highly over-invoiced. Further, it was observed that the imported software was of negligible value and the noticees did not clear the consignments. Added to the above another important fact which had gone against the noticee company is the non existence of M/s. Ganton Ltd., the U.K. supplier. It is pertinent to note that while the invoices were raised from U.K. and the consignments were also sent from U.K. the remittances were made to the supplier's account in Swiss Banking corporation Zurich. In the statement of Sh. Sandeep Puri he categorically stated that M/s. Ganton Ltd. London is a front company of Sh. Abhishek Verma. The facts demonstrate that the import transactions undertaken by the noticee company were with the ulterior motive of transfer of foreign exchange in surreptitious manner in the guise of import payments. During the course of investigations by the directorate as well as during adjudication proceedings no one came forward on behalf of the noticee company to explain the transaction or adduced any submissions in its defense. The charge against the company for contravention of Sections 8(3) & 8(4) of the FERA, 1973 are therefore well established based on the materials and evidence gathered and relied upon in the SCN.*
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> *xxxxx xxxxx*

61. As regards the charges against S/Sh. Abhishek Verma, Sandeep Puri, Jitendra Agarwal, D.K. Rastogi and M.A. Khan, notice no. 5 to 9 on analysis of the materials on record. It is observed that Sh. Abhishek Verma was the chairman of M/s. Esam and was the pivotal around which the whole activities of M/s. Esam had been taking place. In his defense reply, Sh. Verma submitted that he was no more connected with M/s. Esam during the period in which the import transactions which are the subject matter of the SCN took place. His submissions revolved around the contention that he had resigned from the Board of Directors of the company in the year 1993 and thereafter he had no connection what so ever with the company. However, there submissions when examined vis-a-vis the records gathered by the directorate during the course of investigations and those which were relied upon revealed that there is no merit in those submissions. It is observed that the remittances to the tune of US$ 17.74 lakhs were made by M/s. Kudos (P) Ltd. and the requisite Indian currency funds were provided by Sh. Abhishek Verma through his company M/s. Esam, even the business of M/s. Kudos (P) Ltd. in dealing with computer software was an idea floated by Sh. Abhishek Verma and put into shape through Sh. Ravi Bhatnager/Manish Bhatnagar. The department had made enquiries with various money changers and foreign Embassies and records gathered therefore revealed that Sh. Verma had been availing foreign exchange under LERMS for business travels on behalf of M/s. Exam. Further Sh. Abhishek Verma had applied for visa to various embassies stating that he was representing M/s. Esam as its Chairman/director. A brief account of the enquiries are as discussed below.

62. During the course of the investigations. Documents were collected from various money changer viz. M/s. Bajaj Travels, New Delhi, M/s. Dension Finance Ltd and M/s. American Express Travel Related Services, New Delhi and M/s. R.R. Sen & Bros. (P) Ltd. The security of the passport of the notice revealed that he had availed foreign exchange under BTQ/LERMS from the aforesaid money changers for his travel abroad for business/personal purpose. This facility of foreign exchange for travel aboard was availed in his capacity as Chairman of M/s. Esam. The aforesaid money changer i.e. M/s. Bajaj Travels vide letter dated 15.12.1999. M/s. Denson Finance Ltd. vide letter dated 20.12.1999. American express Travels Related Services vide letter dated 21.12.1999 and M/s. R.R. Sen & Bros. (P) Ltd.

vide letter dated 11.2.2000 furnished copies of the relevant documents which the notice/his company submitted to them as the time of availing the foreign exchange under the BTQ/LERMS schemes.

63. Further, the department caused enquiries with various Embassies of foreign countries viz. Embassy of France, British High Commission, Embassy of Brazil, Embassy of Switzerland and Embassy of Finland and the replies/details furnished by them vide letter dated 14.3.2000 respectively confirmed that applications were submitted to the said Embassies for obtaining visas for the notice's travel abroad for business promotion of M/s. Esam.

64. The depositions of Sh. Ravi Bhatnagar, Director of M/s. KEP and those of S/Sh. Sandeep Puri, Jitendra Agarwal and a number of other persons whose statements were relied upon as evidence together with the detail forwarded by the bankers of M/s. Esam established in undisputed manner about the nexus of Sh. Verma in the import transaction of Ms. KEP. It further established that the version of Sh. Verma that after 1993 he was in no way connected with Ms/s. Esam was contrary to facts on record. In fact the various record read with the depositions of the concerned persons displayed that Sh. Abhishek Verma was the sole authority who had enjoyed unquestionable and enormous power of decision making not only in M/s. Esam but also in M/s. KEP and the other directors were acting according to the tunes of Sh. Verma, on careful consideration of the materils. It became amply clear that the charges against M/s. Esam Trading Co. Ltd. (M/s. Esam India Ltd.) and Sh. Abhishek Verma were proved to the hilt despite his efforts to disassociate himself from the activities of the companies.

65. As regards S/Sh. Sandeep Puri, Jitendra Agarwal, D.K. Rastogi and M.A. Khan it is observed that the said Directors/officials of the company were paid directors appointed by Sh. Abhishek Verma at his own whims and fancies as Sh. Verma was the virtual owner of the company holding 99% of the equity share, from the statements of S/Sh. Sandeep Puri Juitendra Agarwal and D.K. Rastogi recorded during the course of investigations and also the documents gathered during the course of investigation. It became ardently clear that they were cimply carrying out the instructions of Sh. Verma and being paid

> *directors had not other choice but to act in tune with the directions of Sh. Abhishek Verma. In fact the depositions of S/Sh. Sandeep Puri, Jitendra Agarwal and D.K. Rastogi had helped the department in unearthing a huge racket in surreptitious of funds from India to bank account in Switzerland. Further Sh. D.K. Rastogi was a Chartered Accountant taken on the board of directors of stream lining the accounting system of the company. All of them stated in unambiguous terms that Sh. Abhishek Verma was the master-mind behind all the transactions and had a hand in all the decisions. In the circumstances, I find that the charges attributed against them the SCN are not sustainable on the fact of the submission made by them in their Defense that they were merely tools in the hands of Sh. Verma."*

8. The petitioner contends that with his exoneration in the adjudication proceedings, the foundation for continuing the prosecution no longer exists. Learned counsel relied on several judgments and urged that adjudication by the Special Director and the order in those proceedings were issued on merits; they fully exonerated the petitioner. Accordingly, he was entitled to the quashing order claimed in these cases.

9. Learned counsel relied upon the judgment of the Supreme Court reported as *G.L. Diswania and Anr. vs. Income Tax Officer and Anr.,* 1995 Suppl. (2) SCC 724 and *Uttam Chand vs. Income Tax Officer, Central Circle, Amritsar*, (1982) 2 SCC 543. He also relied upon the recent judgment in *Sunil Gulati vs. R.K. Vohra*, 2007 (1) JCC 220.

10. Learned counsel for the respondent urged that the mere fact that the petitioner was exonerated in departmental or adjudicatory proceedings would not entitle him to escape prosecution in criminal proceedings which are independently maintainable. Reliance was placed upon *P. Jayappan vs. S.K.*

Perumal, First Income-Tax Officer, Tuticorin, 1984 (Supp) SCC 437; *Commissioner of Income Tax. Mumbai vs. Bhupen Champaklal Dalai and Anr.* (2001) 3 SCC 469 and *Surkhi Lal vs. Union of India*, (2005 (3) JCC 1788.

11. This Court in the judgment reported as *Sunil Gulati vs. R.K. Vohra, 2007 (1) JCC 220* which was relied upon by the learned counsel for the petitioner during the hearing, elaborately considered the various nuances of identical problems, where adjudication proceedings culminated in orders favouring the accused/assessee and where in exercise of independent powers prosecution or complaints were launched. The Court after noticing various judgments including Supreme Court rulings and the judgment in *Standard Chartered Bank's case (supra)* was of the opinion that though seemingly there was a facial conflict in the different strands of reasoning, yet on a deeper analyses, it was apparent that it was one thing to say that two proceedings could be maintained as a matter of law, but entirely another to say that after suffering an adjudication order on the same facts, the department or the prosecuting agency ought not to be allowed to prosecute the assessee having failed to establish the basic and necessary facts. The issue is not, therefore, as much as existence of power to prosecute an offender, as the finding by a competent Court or Tribunal about foundational facts which would justify prosecution.

12. The court, after noticing the ostensibly conflict in reasoning, in various judgments, reconciled the question, in the following terms:

> "*In fact, various cases of the Supreme Court, not whereof is taken above, deal with different situations. The principles which can be culled out from the aforesaid judgments, when all these judgments are read out harmoniously, would be the following:*
> *1. On the same violation alleged against against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.*
> *2. The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeoparty as they are not in the nature of "prosecution".*
> *3. In case adjudication proceedings are decided against a person who is facing prosecution as well and they Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.*
> *4. In case converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see that reasons for such exoneration to determine whether these criminal proceedings could still continue. It the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have not bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication*

proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any act."

13. In the present case, several concerns or firms were alleged offenders; they were called upon to show cause why penalties ought not be levied upon them. Individual directors and others, perceived to be offenders were also called upon to furnish their explanations. The findings, based on elaborate analysis of the materials and the explanations afforded to the adjudicating officer, namely, Special Director, held the concerns/companies and those integrally connected with their functioning, or in control of its affairs who were responsible for the actions, guilty and imposed substantial penalties. However, the petitioner was fully exonerated and found not to have played a part or role that was culpable. The criminal complaint filed parallely during the time when the adjudication proceedings were pending, contained identical allegations based on the same facts.

14. It is no doubt true that judgments of the Court have settled the position that exoneration in adjudicatory or assessment proceedings should not automatically result in conclusion that criminal complaints are not

maintainable. The court examining the issue should consider the facts of each case. If the exoneration is based on technicalities or in the absence of certain features which are otherwise available in the criminal proceedings, the latter should be allowed to proceed. Additionally, the Court has also to consider other circumstances such as whether an appeal is maintainable before a superior or appellate body and is pending; the standard of proof in either proceedings etc.

15. In the facts of this case, it is evident that the findings of the Special Enforcement Director discharging the show cause notices issued to the petitioner were premised on merits and on full appreciation of all the factors. In these circumstances, I am of the considered view that such a decision amounts to a categorical and unambiguous finding that no contravention of provisions of law, took place. It, therefore, falls within the fourth category contemplated in *Sunil Gulati's* case. Therefore, the basic reason for prosecuting the petitioner, namely, his having contravened provisions of the Act, a foundational issue, in terms of violation of Section 56 ceased to exist.

16. There is one more material aspect, which is that the appeal to the Appellate forum in such cases, can be availed of only by a person aggrieved. No material was brought to the notice of the Court that the appellate remedy could be invoked by the Enforcement Department against orders of the Special Director. The necessary conclusion in these circumstances is that it

would unjust to permit the prosecution of the petitioner in the complaints filed by the respondent. The proceedings in complaint Nos. 581/1/2002 and 582/1/2002 pending before the concerned court are quashed, as far as they concern the petitioner.

17. The petitions are allowed in the above terms with no orders as to costs.

(S.RAVINDRA BHAT)
JUDGE

April 18, 2007
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